Docket No. 96-1395

IN THE

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner

v.

HARRY R. McMANUS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT KYE'S BRIEF IN OPPOSITION

Neil C. Bonney, Esquire
Counsel for Respondent Sharon Kye
NEIL BONNEY & ASSOCIATES, P.C.
4652-A Haygood Road
Virginia Beach, Virginia 23455
(757) 460-3477

18 pp

QUESTION PRESENTED

WHETHER IT IS PERMISSIBLE FOR A FEDERAL AGENCY TO SEPARATELY CHARGE AN EMPLOYEE WITH MAKING FALSE STATEMENTS DURING AN AGENCY INVESTIGATION WHEN THE EMPLOYEE DENIES THE MISCONDUCT AND THE AGENCY CHARGES THE EMPLOYEE WITH THE UNDERLYING MISCONDUCT

STATEMENT REQUIRED BY RULE 29.6

The Petitioner has correctly listed the parties to the proceeding. There is no corporation which is a party to this proceeding.

Table of Contents

Table of Authorities

No. 96-1395

In the

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT KYE'S BRIEF IN OPPOSITION

Pursuant to Rule 15 of the Court's rules, Respondent Sharon Kye, respectfully files this brief in opposition to the Office of Personnel Management's Petition for a Writ of Certiorari.

CITATIONS OF OPINIONS AND JUDGMENTS DELIVERED BY THE COURTS BELOW AND NOTICE THAT JURISDICTION OF THIS COURT IS CORRECTLY PRESENTED BY PETITIONER

The decision of the United States Court of Appeals for the Federal Circuit is reported as King v. Erickson, et al., 89 F3d 1575 (Fed. Cir. 1996). The decision of the Merit Systems Protection Board is Kye v. Defense Logistics Agency, 64 MSPR 570 (1994). Jurisdiction is correctly presented by petitioners.

STATEMENT OF THE CASE

The petition arises from multiple disciplinary proceedings against government employees. In the case of Respondent Kye, the Administrative Judge sustained four of the original six charges of misconduct and upheld the appellant's removal. The respondent appealed to the Merit Systems Protection Board (MSPB or Board), who upheld three of the four remaining charges, but reversed the charge of providing false information in an official investigation, based on *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994), which followed the ruling of *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988). Pet. App. p. 63a[1]. The

[1]"Pet. App. p. ___" refers to the Appendix filed by the petitioner in this case.

Board also mitigated the penalty from removal to a 45-day suspension, finding it to be "the *maximum* reasonable penalty for the sustained charges." Pet. App. p. 64A. (emphasis added). The Federal Circuit affirmed the decision. Pet. App. p. 2a.

ARGUMENTS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Constitution affords every person in the United States due process before the government can deprive him or her of life, liberty or property. A federal government employee has a property interest in his or her employment with the government, and as such, the federal government must provide due process to its employee before terminating him or her. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *See also*, 5 U.S.C. § 7513 (1994). Government employees are entitled to, among other things, an opportunity to respond to the charges on which the government has based a decision to terminate. 5 U.S.C. § 7513(b) (1994). The Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), held the opportunity must be meaningful, not merely pretextual. *Id.* at 546. The court of appeals in the case at bar, relying on *Grubka*, held in order to protect the employee's meaningful opportunity to respond to charged misconduct, an agency cannot charge an employee with making false statements during an agency investigation when the employee denies the misconduct and the agency charges the employee with the underlying misconduct. Pet. App. p. 21a. The petitioner seeks to

deny federal employees a meaningful opportunity to respond to charges, arguing that the decision of the court of appeals which permits an employee to deny the charges and call for proof creates a right to lie for the employees. In support of this erroneous contention, the petitioner cites numerous cases, none of which have false statements as an issue, and therefore do not address the issue.[2]

---

[2]See, Petition, p. 18, n.4.

Washington v. Harper, 494 U.S. 210 (1990). The rights of a mentally ill inmate to pre-medication as opposed to post-medication review of involuntary medication were at issue. The case is applicable to the petition before the Court today only in holding, "[t]he procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case." *Id.* at 229; citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Hewitt v. Helms*, 459 U.S. 460, 472 (1983); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979).

Hewitt v. Helms, 459 U.S. 460 (1983). The required level of review of an inmate's statements and facts surrounding an inmate's restricted confinement after a prison riot were at issue. The Court held that prison administrator's decisions deserved wide-range deference, so that even if impunity for false statements were at issue, the Court's standard of review would not apply to "procedural rules designed for free citizens in an open society." *Id.* at 472 (citations omitted).

Vitek v. Jones, 445 U.S. 480, (1980). The right of an inmate to notice and opportunity to be heard prior to a decision to transfer to mental hospital were at issue. Once again the absence of false statements as an issue and the different level of deference and review make the case inapplicable to the petition presently

The petitioner also argues that procedural due process is not at issue in charging an employee with both the misconduct and the false information charges. However, as held by the Board and affirmed by the court of appeals, to allow the agency to charge an employee with both charges any time he or she denies the charged misconduct, effectively and automatically creates a second charge, unless the employee admits to the misconduct with which he or she is charged. Pet. App. p. 15a; 29a; 39a. Thus, any time an employee contests an agency's action and articulates a different version of the truth than the "official" version, that employee risks an additional or subsequent falsification charge if every factual finding (based on a mere preponderance) does not go her way. The charge of falsification is of such magnitude and potential penalty, few employees would risk the consequences, which include termination, for the sake of availing themselves of their right to respond to the misconduct charged against them. Pet. App. p. 17a. In essence, even minor charges would become removal offenses, if denied,

---

before the Court.

Matthews v. Eldridge, 424 U.S. 319 (1976). The Court set forth the test for determining the sufficiency of the provided level of procedural due process. The issues before the Court were based on the rights of disability recipients to review of termination of benefits decisions, with no accusation of false statements.

While these are only a sampling of the cases which the petitioner cites in support of its statement, none of the cases cited in n. 4 had false statements as an issue.

based on the additional charge of making false statements. As such, the employee's procedural due process rights would be constructively denied, and the employee's right to respond to charges would no longer be meaningful, a violation of the Constitution.

The petitioner would have the Court believe that employees have nothing to fear because only valid charges are brought, and if the employee is telling the truth, then the underlying charges will not be sustained. This theory decries the basis for the country's entire justice system. Investigation of past events is not a perfect science; mistaken identification, misinformation and accusing the innocent occur on a daily basis. In addition, individuals might have a technical basis for denying a suspiciously or unfairly worded agency charge and requiring proof on the allegation. It is for this reason that our justice system holds the accused innocent until proven guilty and allows the accused to plead not guilty, thereby forcing the accuser to prove guilt.[3] The level of proof required of the agency is by a

---

[3] "A person charged with an offense can deny the charge and plead not guilty, either because he is not or to force the charging party to prove the charge. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge." *Grubka*, 858 F.2d at 1575. *Grubka* involves a federal employee who was accused of misconduct, denied the misconduct, gave an explanation of what happened, and was subsequently charged with making false statements during an agency investigation. The charge was dismissed by the court of appeals. *Id.* The facts in *Grubka* are analogous and nearly on point to the facts of the petition before the Court today.

preponderance of the evidence before an administrative judge with different rules of procedure and evidence than in a regular court.

The petitioner also fails to address the type of misstatement for which Respondent Kye stands accused. The false information she was charged with centered around the date upon which she regained control of her government issued Diner's Club card. Respondent admitted that if she did in fact tell her superior that she had control of and had destroyed the card on the date in question, she misspoke. Respondent tried to correct the misstatement during the course of the investigation. Under the theory set forth by the petitioner, an innocent misstatement by an employee upon being confronted with charges, regardless of subsequent efforts to assist in the investigation or correct the error, could result in termination of the employee. As previously stated, such potential for serious consequences would "chill" an employee's right to respond to charges (except by way of admitting to them), a right which is guaranteed by the United States Constitution and would further prevent them from correcting errors which later come to light through additional information for fear of a removal action. It is conceivable an employee, after learning of additional information, corrects a portion of an earlier statement only to find that his good-faith actions have lead to a charge of giving false statements and his removal.

The court of appeals in *Grubka* applied the term "plead[ing] not guilty" to the civil employee who denies

charges of misconduct brought against him or her by the government. *Grubka*, 858 F.2d at 1575; *See* n. 2 for quote. A criminal defendant who pleads not guilty cannot, based solely on the fact that she pleaded not guilty, be charged with making false statements when she is found guilty by a jury. To allow such "extra" charge would to effectively eliminate the protections of the Fifth Amendment against self-incrimination. The Court in *Grubka* held that requiring an employee to incriminate himself or herself by admitting to the alleged misconduct charged against him or her would require the court "[t]o hold that the rule violates the provisions of the Fifth Amendment to the Constitution against self-incrimination." *Grubka*, 858 F.2d at 1575. This Court has applied the Fifth Amendment self-incrimination protection to civil proceedings, *Id.*, and as such civil employees are afforded the same protection. Civil employees do not have the right to remain silent, as they can be charged with failure to assist in an investigation. However, federal employees have protection against self-incrimination, and requiring them to admit to misconduct or face additional charges is thus violative of the Constitution.

Petitioner cites *United States v. Dunnigan*, 507 U.S. 87 (1993) as precedent for upholding the government's right to charge the employee with both charges. Pet. Brief, p. 20. However, *Dunnigan* is a criminal case in which the defendant was found guilty of **perjury** and the sentencing guidelines provided an **increased sentence for the underlying offense** based on

finding the defendant guilty of perjury. *Dunnigan*, 507 at 96 (emphasis added).

Two things should be noted of *Dunnigan*. First, the court was not addressing the situation of an **additional, separate** charge being brought against the defendant for the false statements. The Court had before it the issue of whether or not a sentence for one offense could be increased based on a finding of perjury.

Second, *Dunnigan* addresses statements made under oath which were proven, beyond a reasonabledoubt, to be perjury.[4] While the sentencing guidelines which were at issue in *Dunnigan* apply also to statements made during investigations (Pet. Brief, p. 21, n. 6) the application of the guidelines to out of court statements is conditioned on being "materially false . . . that significantly obstruct or impede[] the official investigation or prosecution." *Id.*, citing Guidelines § 3C1.1 & Application Note 3(g). Even in petitioner's "supporting" case, the use of false statements as a basis for increasing the penalty for conviction of underlying misconduct is not without restraint. There has never been any assertion that the charged false statements by

---

[4]The Petitioner confuses the role of the sentencing phase of the trial and the proof phase on p. 21, n.6 of the Petition. The petitioner states that the burden of proof in the sentencing phase of the criminal case is preponderance-of-the-evidence. While this is true, the finding of perjury is within the criminal fact finding phase of the trial, which is under the beyond-a-reasonable-doubt standard.

Kye would rise to this level of impeding the investigation.

The petitioner misinterprets the court of appeals' holding that "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge," as creating a "right to lie" for the employee. Pet. Brief, p. 13. Such an interpretation is unfounded, and in fact addressed by the court of appeals, which held, "[t]his does not mean, however, that an employee has a right to lie. . . " Pet. App. p. 17a. The court of appeals separates an employee's right to "deny the charges and the underlying facts" from making "false stories" or "telling tall tales." *Id.* Petitioner argues that the line between the two is indistinguishable. This line is no less distinguishable than the line created by the guidelines at issue in *Dunnigan, supra*. False stories and tall tales are material misrepresentations which significantly obstruct or impede an investigation. Such statements "go beyond denial and defense." *Id.* The concerns of the petitioner are addressed by the limitation that only denials of misconduct and the underlying facts are protected from further charges, not statements which go beyond denial and defense. The petitioner's contention that the ruling would give federal employees "substantial latitude to make false statements" is simply unfounded. Additionally, in the near ten years since *Grubka*, the problem of ambiguity of the right to deny alleged

misconduct has not once been an issue in the courts, and has been applied without incident. *See, Beverly v. United States Postal Service*, 136 F.2d 136 (1990) (A second charge for false statements based on a denial of charges dismissed as improper by the administrative judge in initial hearing, affirmed by court of appeals).

In the case of respondent Kye, the "false statements" of which Kye is accused did not materially nor significantly obstruct or impede the investigation. In fact, the statements by Respondent Kye did not obstruct the investigation into the unauthorized charges at all. The statements did not impede the investigators from gathering independent information about the charges and establishing where, when and how the charges were made. Respondent Kye stated that she had not made the credit card charges, and did not have the card in her control until April 2 or 3. This statement did not lead the agency investigation on any other avenues than those which it would have otherwise pursued: investigating when the charges were made; obtaining all information about the charges, including signatures, from the establishments at which the charges were made; determining what the charge amounts were. In fact, the agency was able to obtain signature information on one of the charges, which led to the Board sustaining one of the misconduct charges against Respondent Kye.

Petitioner further argues that to allow an employee to make false statements in the form of a

denial of charges is inconsistent with holding an employee responsible for making false statements about another employee in the course of an investigation. Pet. Brief, p. 13. However, in the case of an employee who makes false statements about another employee, the statements rise to a material level, and obstruct the investigation. If the employee points blame at an employee he or she knows to be innocent of the alleged misconduct or away from an employee he or she knows to have committed the misconduct, the investigation is impeded and obstructed away from the guilty employee.

The decision of the Board and the court of appeals is soundly based on precedent. The decision is based on sound Constitutional principles, as well as administrative procedure principles. No negative examples of the application of this rule have been cited since *Grubka* and there is no need for a change in the current state of the law. There are no unjustified constitutional restraints on the government when it is required to afford its employees the same rights protected by the constitution to other accused persons, whether in a criminal or civil context.

CONCLUSION

The respondent respectfully prays the petition for a writ of certiorari be denied.

Respectfully submitted.

NEIL C. BONNEY
Counsel of Record for Respondent Kye
NEIL BONNEY & ASSOCIATES, P.C.
Attorneys and Counsellors at Law
Haygood Office Buildings
4652-A Haygood Road
Virginia Beach, Virginia 23455
(757) 460-3477

APRIL 1997